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HAROLD B. WILLE

IN THE

Supreme Court of the United States

October Term, 1953

No. 748

E. MERL YOUNG,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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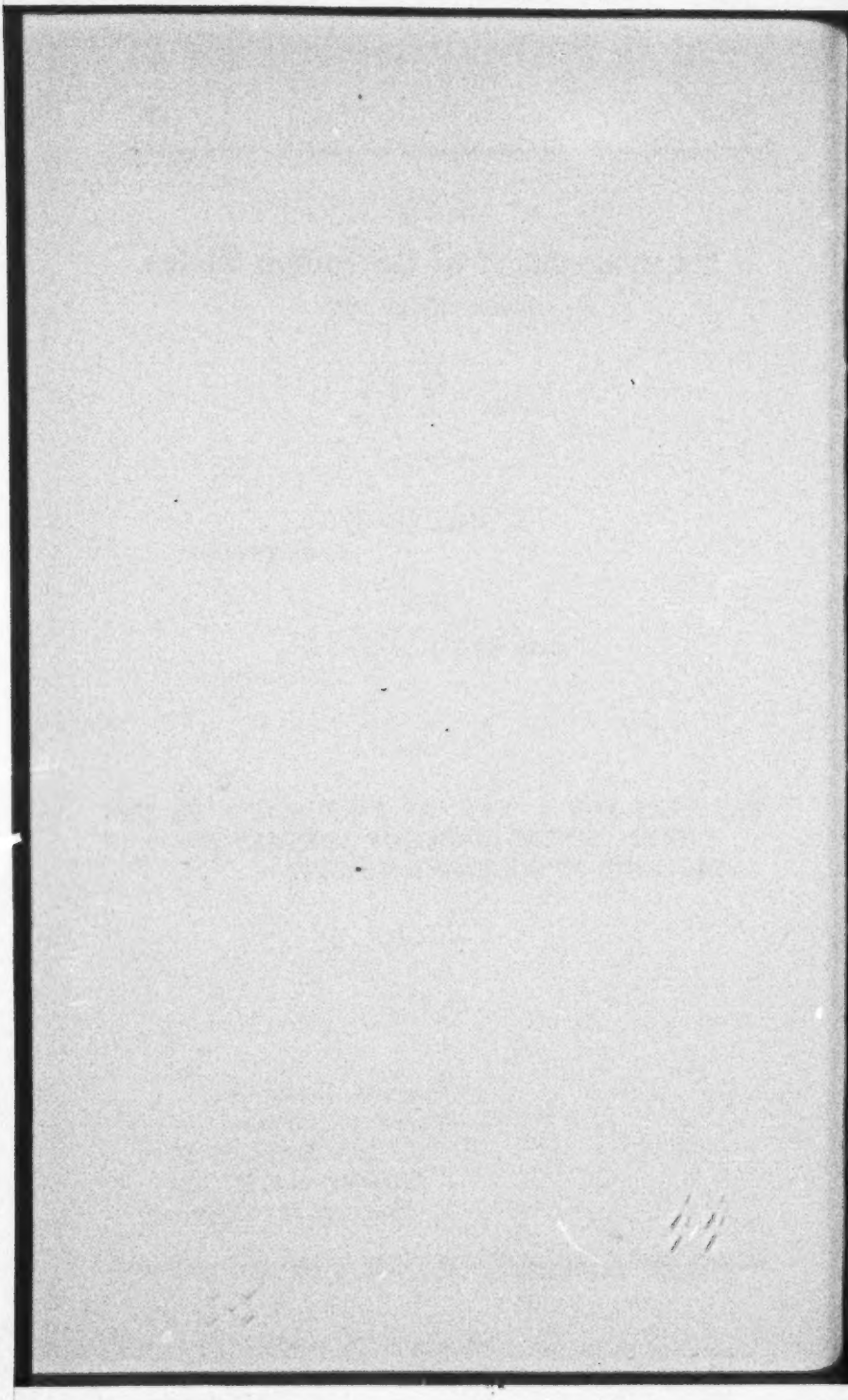

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United States of America,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, appellant below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on April 8, 1954.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is set forth on page 38, et seq. of the record. It has not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 8, 1954 (R. 48). The jurisdiction of this Court is invoked under *28 USC 1254, (1). F. R. Cr. P. 37 (b), 2.*

QUESTIONS PRESENTED

1. Whether the intentional and systematic exclusion from the jury list of all residents of the District of Columbia who voted outside of the District of Columbia, invalidated the panel which returned the indictment herein involved.[1]

2. In a case where the defendant was subpoenaed before the Grand Jury, which found the indictment herein, was it prejudicial error for the prosecutor to comment in his closing argument that the defendant's explanation before the Grand Jury had made no impression on that body, and thus, in effect, argue that an indictment is evidence of guilt.

STATUTES INVOLVED

Title 11, Section 1417, D. C. Code (1951):

> "No person shall be competent to act as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one and under sixty-five years of age, able to read and write and to understand the English language, and a good and lawful person, who has never been convicted of a felony or a misdemeanor involving moral turpitude."

Title 11, Section 1430, D. C. Code (1951) provides that certain persons (not here material)

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[1] The Court below characterized the practice as "certainly erroneous." (R. 40).

"* * * shall be exempt from jury duty, and their names shall not be placed on the jury lists. * * * All other persons otherwise qualified according to law * * * shall be qualified to serve as jurors in the District of Columbia and *shall not be exempt from such service.*" (Italics supplied)

STATEMENT OF THE CASE

Petitioner was indicted for perjury before a Senate subcommittee and the Grand Jury (R. 10A). Nine weeks prior to the trial, which began on March 23, 1953, and within the time prescribed by the *Federal Rules of Criminal Procedure 12 (b) (3)*, he requested permission to file a motion to dismiss the indictment and each count thereof (R. 23A), on the ground that qualified jurors had been excluded from the jury list from which the Grand Jury returning the instant indictment was selected. The motion alleged that residents of the District of Columbia who voted elsewhere were systematically excluded from jury service. The motion charged that the panel did not represent a cross-section of the community and was selected in contravention of the statute. (R. 25A).

The trial court denied the motion, without opinion (R. 26A). The Court below decided the question on the merits, holding:

> "The jury commissioners excluded from the jury list all persons who voted outside the District of Columbia, on the ground that they could not be 'residents' of the District of Columbia. This practice, which has since been discontinued, was certainly erroneous. (cases cited). The question is whether it warrants reversal." (R. 40)

The Court held it did not, lacking a showing of prejudice (R. 41, note 5).

The second point presented herein by petitioner challenges the prosecutor's closing argument to the jury. He said:

(Tr. 1008-1010)[1]

"The Grand Jury, in conclusion, ladies and gentlemen, they didn't believe him when they said he had nothing to do with these Lustron applications. Of course the indictment means nothing. That is just a charge. It is a means whereby he is brought into court.

"But the fact remains that his denial there made no impression on the Grand Jury. His denials about the other things made no impression on the Grand Jury. I submit to you, ladies and gentlemen, that while they put on quite a lot of ballyhoo here, the simple facts are that this man falsified his testimony in both places, and that he intentionally did so, and that therefore your verdict should be guilty.

"I ask you ladies and gentlemen to go out and consider the case carefully, and bring back into this court such verdict as you think speaks the truth.

"Thank you.

"MR. REILLY: If the Court please, I would like to make one observation to the Court about the statement made by counsel.

"THE COURT: Come to the bench, please.

(At the bench:)

"MR. REILLY: Comment made by counsel for the government to the effect that the Grand Jury didn't believe him was entirely improper. It wasn't based on anything that I said; it wasn't an answer to anything said by the defendant. There is nothing in the record to indicate that that was in the evidence in any manner whatsoever. It should be disregarded.

"THE COURT: I don't know whether it was in the evidence or not, but I assume that his remark was directed to the fact that the indictment was returned even after he testified before the Grand Jury. I assume that is what it was.

"MR. PAISLEY: That is right. He was questioned before the Grand Jury. The jury knows it. It is in evidence.

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[1] The reference is to the original record filed herein. Petitioner's finances did not permit a reprint. The present quotation is all that is necessary to an understanding of the point involved.

"THE COURT: I will cover that.
"MR. REILLY: I think that was highly improper and for that reason I move for a mis-trial."

The court did not grant the motion. It did charge that an indictment is not evidence or proof but made no specific reference to the prosecution's argument (Tr. 1013).[1]

The prosecutor's erroneous argument was aggravated by a similar transgression earlier in his argument when he said:

> "They tried to deceive the committee, tried to deceive the grand jury, they have tried to deceive you, but they are not going to get away with it in my judgment." (Tr. 996, 997)

To this, no objection was made; but when repeated, objection was made as above set forth with appropriate motion for mistrial. (Tr. 1010)

The Court below in passing upon this contention of petioner said: (R. 47)

> "Finally, appellant complains of several of the questions asked and remarks made at the trial by the prosecutor. We have studied the record as to these incidents. We do not believe they warrant a new trial, and hence do not deem it necessary to detail them here."

REASONS FOR GRANTING THE WRIT

The opinion of the Court below on point one presented herein is contrary to the applicable decisions of this Court as announced in *Ballard v. United States, 329 U. S. 187, 195*, and at variance with the decision of the Circuit Court of Appeals for the Third Circuit in *Dow v. United States Steel Corporation, 195 F. 2nd. 476*, as well as the United States District Court for Iowa in *United States v. Roemig, 52 F. S. 857, 862*, which was quoted with approval in

[1] See footnote page 4.

Ballard v. United States, supra. It is likewise impliedly at variance with this Court's decision in *Hernandez v. Texas* U.S. S. Ct.) No. 406 decided May 3, 1954.

On point two presented herein, the Court below has not given proper effect to the decision of this Court in *Berger v. United States, 295 U. S. 78, 88,* enjoining prosecutors from unfair conduct in criminal cases. A jury should not be told to reject the testimony and disbelieve the defendant because the Grand Jury did not believe him, particularly when the Grand Jury proceedings were not in evidence. If the present conduct is sustained as proper no one would be inclined to testify before a Grand Jury. An important question of public policy is thus involved.

ARGUMENT

I

The Decision Below is Contrary to the Decisions of This Court and in Conflict With the Decision of the United States Court of Appeals for the Third Circuit.

The Grand Jury was improperly selected. The Court below so held. However, it stated the error did not warrant reversal (R. 41). Statutory directions for the selection of juries should be followed. Only in doing so is a cross-section of the community obtained for jury service. Such is the purpose of the statutes. Inasmuch as the statute prescribing the manner in which the Grand Jury shall be selected was not followed, the indictment by the Grand Jury so impaneled was void. Observance of procedural regularities is mandatory. cf. *McNabb v. United States, 318 U. S. 332, 347.*

Improper, systematic and intentional exclusion of qualified jurors has been condemned by this Court in:

Ballard v. U. S., 329 U. S. 187, 195, 91 L. Ed. 181.
Glasser v. U. S., 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457.
Hernandez v. Texas U.S. S. Ct. No. 406 decided May 3, 1954.

Thiel v. Southern Pacific, 328 U. S. 217, 90 L. Ed. 1181, 66 S. Ct. 984, 166 A. L. R. 1412.

Cassell v. Texas, 339 U. S. 282, 94 L. Ed. 839, 70 S. Ct. 629.

In *Ballard v. United States, 329 U. S. 187, 91 L. Ed. 181, 67 S. Ct. 261,* this Court dealt with an indictment returned in a Federal Court by a grand jury from which women had been intentionally and systematically excluded. This Court reversed the conviction and said:

Pages 195-196

> "The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group, *Smith v. Texas, 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164,* or an economic or social class, *Thiel v. Southern P. Co., 328 U. S. 217, 90 L. Ed. 1181, 66 S. Ct. 984, 166 A. L. R. 1412,* supra, deprives the jury system of the broad base it was designed by Congress to have in our democratic society. It is a departure from the statutory scheme.
>
> • • • •
>
> "If, as in the Thiel Case, we had merely an instance of a petit jury drawn from an improper panel, we would remand the cause for a new trial. But, as we have said, the grand jury was likewise drawn from a panel improperly chosen and therefore the indictment was not returned in accordance with the procedure established by Congress. Accordingly, the indictment must be dismissed."

The instant indictment was drawn in a manner contrary to the procedure established by Congress. The numerous residents of the District of Columbia who voted elsewhere were systematically and deliberately excluded from the panel. Under the doctrine of *Ballard v. U. S., supra,* the indictment must be dismissed.

The decision below is in conflict with *Dow v. United States Steel Corporation (CCA 3rd), 195 F. 2nd. 478.* There, the plaintiff, in a civil action, moved to strike the jury panel on the ground that the selection of jury panels did not comply with the law. The plaintiff challenged the selection because the jury list excluded foreign born citizens, veterans, labor people, negroes and many others. The Court vacated the proceedings and sustained the defendant's motion to challenge the "array." The Court said: (page 480)

> "The federal statutes having to do with juries do not give many mandatory directions for compiling lists of prospective jurors."

The reversal directed the lower court to ascertain if the jury was selected contrary to the statute; and if so, to award a new trial.

Exclusion of those residents of the District of Columbia who vote elsewhere by the systematic exclusion of their names from the jury list is illegal for the elementary reason that the Grand Jury was not organized as prescribed by the statute. The Court below said the practice was "certainly erroneous." It held, however, that the group excluded must be a cohesive group, and that residents of the District of Columbia who vote elsewhere were not a cohesive group.

Jury competence is an individual rather than a group or class matter. *Thiel v. Southern Pacific Co., 328 U. S. 217, 220.* It can hardly be said that those excluded in the *Thiel* case such as wage earners, whether men or women, miners, longshoremen, lumbermen, electricians, seamstresses, waitresses, department store employees, or the many other variations of the callings of those who work for wages, are any more a cohesive group than those of all occupations, whether in government or in private industry, who work and live in the District of Columbia but vote in their home state.

This Court can take judicial notice that many, many government employees and others in private enterprise reside in the District of Columbia and vote in their home state. They comprise a substantial portion of the population of the District of Columbia. They secure the benefits of local government. They constitute a cross-section of the community and participate in the social, civic, religious and other activities of the area. They are a group of people constituted no differently in an economic, social, religious, political or geographical sense than those excluded from jury service in *Thiel v. Southern Pacific Co., supra.* Their exclusion from jury lists renders the panel from which the grand jurors were selected unrepresentative of the community. Hence the indictment was fatally defective. *Ballard v. U. S., supra.*

A cohesive group is one held together by a common bond or union, but it could hardly be said that all of a certain race or religion are a cohesive group in any manner except their color or belief. Members of a labor union, veterans organization, political or professional associations are not a cohesive group except in their one common enterprise.

We submit that the decisions of this Court compel the jury commission of the District of Columbia to comply with the mandate of the statute in the selection of jurors. A large section of the populace must not be excluded because they are or are not a cohesive group.

It was not necessary to determine whether petitioner was in any way prejudiced by the wrongful exclusion of a class of residents from the panel. cf. *Thiel v. United States, 328 U. S. 217, 225,* and cases there cited.[1] See also this Court's recent decision in *Hernandez v. Texas* No.

[1] The Court below (R. 41, note 5) stated its conclusion might be different if prejudice was alleged and proved. Petitioner has no way of knowing whether he was prejudiced. Compliance with the statute in the selection of jurors was the way Congress sought to avoid prejudice.

406 May 3, 1954, wherein this Court repudiated any requirement of proof of prejudice stating that the defendants sole claim was his right "to be indicted and tried by juries * * * selected from among *all* qualified persons * * *" (Italics ours)

In *United States v. Roemig, 52 F. S. 857, 862 (D. C. Iowa N.D.)*, quoted with approval by this Court in *Ballard v. United States, 329 U. S. 187, 195*, the Court said that where one had been indicted by a Grand Jury selected contrary to law, the indictment must fail without proof of injury to the defendant. There, the Court said that the inquiry is whether the defendant has been indicted by a Grand Jury selected as he had the right under the law to expect and require it to be selected. If that inquiry was answered negatively, said the Court, the indictment ought to fail without requiring proof of injury.

Furthermore, when the Court declined to permit the instant motion to be filed (R. 4A), the petitioner was denied an opportunity to show prejudice, if it was necessary to be shown. This was contrary to the decision of the Third Circuit in *Dow v. United States Steel Corporation, 195 F. 2nd. 478.*

This Court said in *Glasser v. United States, 315 U. S. 60, 86:*

> "Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties."

II

THE CLOSING ARGUMENT OF THE PROSECUTOR COMMENTING UPON THE INDICTMENT AS EVIDENCE WAS ERROR:

Petitioner had been subpoenaed to appear before the Grand Jury investigating the facts developed before the Senate Subcommittee on Banking and Currency while that body was conducting a hearing and study of the operations of the Reconstruction Finance Corporation. During the sessions of the Grand Jury, he answered questions propounded to him relative to his testimony before the committee. He was indicted for perjury alleged to have been committed before the committee and the Grand Jury. The prosecutor in his closing argument stated that petitioner's denial of guilt before the Grand Jury made no impression upon it. This, in effect, was an argument that the indictment was evidence; it erroneously assumes the Grand Jury is a trier of facts, which it is not; it converts a criminal case into two trials instead of one and makes the first trial evidence in the second. We submit:

(a) It violated the rule that the indictment can never constitute in any respect proof of the offense.
(b) It transgressed the rule that the presumption of innocence continues at all times during the trial.
(c) It constituted an unlawful method of attacking the credibility of the defendant.
(d) It was based upon the Grand Jury proceedings which were not in evidence and proffered issues which the defendant could not meet without trying collateral matters.

Not only is the indictment not evidence (*Cooper v. U. S., 9 F. 2nd. 216, 226 (CCA 8th); U. S. v. Schanerman, 150 F. 2nd. 941, 945 (CCA 3rd); Nanfito v. U. S., 20 F. 2nd., 376, 378, 379 (CCA 8th); Patterson v. U. S., 183 F. 2nd. 687, 690 (CCA 5th)*), but the legislature is powerless

to make it so *(Tot v. U. S., 319 U. S. 463, 469, 87 L. Ed. 1519, 1525)*.

In *Patterson v. U. S., supra*, the conviction was reversed because the Court instructed the jury that the indictment was no evidence of guilt but went on to say: (page 690)

> "It has no further force or vitality until it is substantiated by competent evidence."

The Court in reversing said: (page 690)

> "It is clear that the appellant was correct in his contention that an indictment in and of itself is never evidence of the guilt of the accused and an inference to the contrary having been created by the charge, the appellant was entitled to have the court formulate a correct instruction that would meet defendant's objection."

In the present case, the prosecution's argument conceded that the indictment was only a charge; but, at the same time, utilized the fact of the indictment as an argument for conviction by the device of claiming the Grand Jury, in finding the indictment, had obviously refused to believe the defendant's testimony before it. It follows, therefore, that the prosecution drew strength for conviction from the fact of the indictment.

The presumption of innocence attends the accused at all times *(U. S. v. Fleischman, 339 U. S. 349-363, 94 L. Ed. 906, 915; Curley v. U. S., 160 F. 2nd. 229 (D. C. Cir.))*. Any utilization of the indictment, either as proof or as the basis of an attack upon the credibility of the defendant transgresses this rule. The vice is that an inference from a mere charge (i.e., alleged Grand Jury disbelief of his explanation) is made the basis for an argument that the defendant's testimony at his trial is false.

The prosecution's argument is an unlawful attack upon the credibility of the defendant. The prosecution's sequence is as follows:

1. The defendant testified before the Grand Jury.
2. The Grand Jury indicted the defendant.
3. Hence, the Grand Jury did not believe the defendant, and therefore the trial jury should not believe the defendant.

The unsoundness of this argument is apparent. The trial jury must try the defendant upon the evidence produced before it, not evidence unknown as to quantum, source or reliability, which may have been produced before the Grand Jury.

The evidence developed before the Grand Jury was, of course, produced by witnesses who did not confront the defendant as the Constitution requires. *Amendment VI, U. S. Constitution.*

The prosecution's illogical argument is that because a group of people on a different occasion and upon testimony which was not before the trial jury did not believe the defendant, the trial jury should refuse to believe him. This argument transgresses all known rules covering attacks upon credibility of witnesses. A defendant may be impeached by showing a contradictory statement upon a prior occasion *(3 Wigmore Evidence (3rd. Ed.) 1940, Sections 902, 1017)*, but this rule is clearly inapplicable to the present case. The prosecution does not claim the defendant testified differently before the Grand Jury. The sole reflection upon his testimony is that the Grand Jury did not believe him. That the Grand Jury found a charge against him is even less ground for impeachment. A witness cannot be impeached by showing a charge of crime; a conviction is necessary. *(3 Wigmore Evidence, (3rd Ed.) 1940 Section 980, 980A).*

The argument violates the rule that a witness cannot be impeached by matters which would require a collateral inquiry. Veracity cannot be attacked by showing that another or others did not believe the defendant on a prior occasion. Only his reputation for veracity is admissible.

(3 Wigmore Evidence (3rd. Ed.) 1940 (Sects. 923, 924;) cf. Sect. 1608).

The prosecution's argument, coming at the very close of the case, was utterly untenable and unfair. Its effect upon the jury can readily be visualized. No more telling argument could be made than to claim that inasmuch as the Grand Jury refused to believe the defendant, the trial jury should likewise refuse to believe him. The prosecution's argument, which to trained legal minds is a *non sequitur*, might shape up to a jury as the soundest logic. Its effect should be estimated in the light of the prosecutor's prior statement:

> "They tried to deceive the Committee, tried to deceive the Grand Jury, they have tried to deceive you, but they are not going to get away with it in my judgment." (Tr. 996-997)[1]

The prosecutor's argument falls within the ambit of conduct condemned by this Court in *Viereck v. U. S., 318, U. S. 236, 247, 87 L. Ed. 734, 741,* and *Berger v. U. S. 295 U. S. 78, 88, 79 L. Ed. 1314, 1321.*

CONCLUSION

It is respectfully submitted the writ of certiorari herein prayed for should be granted.

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[1] See footnote page 4.

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